STATE OF MICHIGAN
SUPREME COURT

Appeal From the Michigan Court of Appeals
The Hon. Amy Ronayne Krause, Henry William Saad and Kurtis T. Wilder

ANTHONY HENRY and KEITH WHITE,

Plaintiffs/Appellees,

vs.

LABORERS LOCAL UNION 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON,

Defendants/Appellants,

and

BRUCE RUEDISUELI,

Defendant/Appellee,

AND

MICHAEL RAMSEY and GLENN DOWDY,

Plaintiffs/Appellees,

vs.

LABORERS LOCAL UNION 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191, MICHAEL AARON,

Defendants/Appellants,

And

BRUCE RUEDISUELI,

Defendant/Appellee.

Supreme Court No. 145631

Court of Appeals No. 302373

Wayne County Circuit Court
Case No.: 10-000384-CD

PLAINTIFFS-APPELLEES MICHAEL RAMSEY and GLENN DOWDY'S APPEAL BRIEF

ORAL ARGUMENT REQUESTED

Supreme Court No. 145632

Court of Appeals No: 302710

Wayne County Circuit Court
Case No: 10-004708-CD

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STATEMENT OF THE BASIS OF JURISDICTION

The jurisdictional summary and standard of review stated in the Defendants-Appellants' Brief is complete and correct.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Regardless of the public body involved, does the LMRDA preempt the WPA?

   The trial court answered: **No.**

   Court of Appeals answered: **No.**

   Plaintiff-Appellees answer: **No.**

   Defendant-Appellants answer: **Yes.**

2. Regardless of the public body involved, does the NLRA preempt the WPA?

   The trial court answered: **Not presented with issue**

   Court of Appeals answered: **No.**

   Plaintiff-Appellees answer: **No.**

   Defendant-Appellants answer: **Yes.**

3. Is a union employee's report to a public body only of peripheral concern to the NLRA or the LMRDA so that the employee's interests are not preempted by federal law?

   The trial court answered: **Yes*.**

   Court of Appeals answered: **Yes.**

   Plaintiffs-Appellees answer: **Yes.**

   Defendants-Appellants answer: **No.**

4. Is the state's interest in enforcing the WPA so deeply rooted that, in the absence of compelling congressional direction court cannot infer that Congress has deprived the state of power to act?

   The trial court answered: **Yes.**

   Court of Appeals answered: **Yes.**

Plaintiffs-Appellees answer:	**Yes.**
Defendants-Appellants answer:	**No.**

*Defendants did not raise NLRA preemption as an issue before the trial court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Whistleblower Protection Act (WPA) case arose when Plaintiff-Appellees Anthony Henry and Keith White were fired as employees of Defendant-Appellant Union because they reported their suspicions of union corruption to law enforcement. Specifically, Plaintiffs informed the United States Department of Labor (DOL) that they suspected their boss, Defendant-Appellant Michael Aaron, had misappropriated union funds and received kickbacks for supplying unemployed members to perform demolition work on a bar known as the "TULC".

Prior to the discharge of Anthony Henry and Keith White, Plaintiffs-Appellees Glenn Dowdy and Michael Ramsey were interviewed by investigators from the DOL concerning the allegations made by Anthony Henry and Keith White. Defendants Michael Aaron and Bruce Ruedisueli were aware of this. After the interview and termination of Anthony Henry and Keith White, Plaintiff-Appellee Michael Ramsey was asked to lie at his deposition concerning the lawsuit brought by Anthony Henry and Keith White. Plaintiff-Appellee Ramsey refused to do such and both Plaintiffs-Appellees Ramsey and Dowdy were terminated. Both Michael Ramsey and Glenn Dowdy then brought WPA claims against the Defendants. Plaintiff-Appellee Michael Ramsey also has a count for violation of public policy for refusing to commit perjury and being terminated.

The Wayne County Circuit Court rejected Defendants' argument that the Labor Management and Reporting Disclosure Act (LMRDA) preempted Plaintiffs' WPA claims. The Court of Appeals affirmed the trial court's ruling and additionally held that Plaintiffs' WPA

claims were not preempted by the National Labor Relations Act (NLRA) under *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 US 236 (1959).

Both lower courts recognized that the core purpose of the LMRDA is to promote union democracy and curb corruption by union leadership. In *Finnegan v. Leu,* 456 US 431 (1982), the Supreme Court held that the LMRDA *only* protects union members, *not* employees. As noted by the trial court and Court of Appeals, Plaintiffs were discharged as *employees* and sought no vindication of any membership rights. Assuming *arguendo* that the LMRDA somehow applied, both lower courts agreed there was no preemption because the WPA is complimentary to-and does not impede or conflict with-the core purpose of the LMRDA.

Defendants also argue that the NLRA preempts Plaintiffs' state WPA claims. In their Circuit Court and Court of Appeals briefs, Defendants repeatedly admitted that Plaintiffs' WPA retaliation claims were based on their reports of union corruption. (78a, 81a, 83a, 84a, 86a-87a[1], 90a, 91a; 571a, 572a, 588a, 614a, 620a-623a.) Now, Defendants excise virtually any reference to Plaintiffs' reports of suspected union corruption or kickbacks to law enforcement. Instead, Defendants allege that Plaintiffs' reports were limited exclusively to work conditions, safety concerns and wages for the TULC volunteers. From these sanitized facts, Defendants' argue that the NLRA preempts Plaintiffs' WPA suit.

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[1] In the trial court, Defendants Brief in Support of Motion for Summary Disposition explained Plaintiffs' claims as follows: "Plaintiffs now claim that they made their union 'corruption' charges to the USDOL. This contact with the USDOL, Plaintiffs claim, and their participation in the USDOL follow-up investigation, prompted their retaliatory discharge." (86a-87a.) In their Brief on Appeal filed with this Court, Defendants alter course and now characterize Plaintiffs' claims as follows: "Plaintiffs Henry and White claim that their report to the USDOL about wages and terms and conditions of employment and their participation in the USDOL's later investigation, prompted their retaliatory discharge." (Brief on Appeal, p. 13.) While the former characterization of Plaintiffs' claim is accurate the latter is not.

Defendants' argument is without merit because the NLRA provides no protection for the TULC volunteers—the persons Defendants erroneously allege Plaintiffs were trying to protect. Even if this Court were to assume that the NLRA "arguably" applies (which it does not) to the retaliatory discharge, there is still no federal preemption. Under the seminal United States Supreme Court case of *San Diego Bldg. Trades Council v. Garmon, supra*, there is no preemption because Plaintiffs' WPA action is peripheral to the core concerns of the NLRA, which are to preserve industrial peace and promote collective bargaining. This case has absolutely nothing to do with union busting, unionizing activities, interpretation of a collective bargaining agreement, or the like. Moreover, neither Plaintiffs nor Defendants ever filed a charge with the National Labor Relations Board (NLRB) which eliminates any danger that state court jurisdiction over this WPA case will undermine or conflict with any finding or action by the NLRB.

There is also no *Garmon* preemption because the WPA touches interests deeply rooted in local feeling and responsibility. Undeniably, Michigan's interest in protecting its' citizens from retaliation by their employer is substantial. The statute makes no exceptions for labor unions. If, however, this Court were to adopt Defendants' position, unions would essentially be immune from WPA liability. This is not the intention of the WPA, the NLRA or any federal statute. This Court, therefore, should affirm.

COUNTER-STATEMENT OF FACTS

A. Structure of Local 1191 and the Parties' Positions of Employment with the Union.

Laborers' Local 1191 (Local 1191) is a labor union located in Detroit, Michigan. In May of 2009, Defendant Michael Aaron became the Business Manager of Local 1191[2]. (199a-200a.) Defendant-Appellant Bruce Ruedisueli was the Local's Vice President. (511a.) Plaintiff-Appellee Anthony Henry, in the companion case, was employed by Local 1191 as a Business Agent, as was Keith White. Plaintiff-Appellee White also worked as Local 1191's dispatcher. (311a, 512a.) Both were union members.

Plaintiff-Appellee Michael Ramsey and Plaintiff-Appellee Glenn Dowdy were also Business Agents employed by Local 1191. (450a.) Plaintiff-Appellee Michael Ramsey was a business agent. Plaintiff-Appellee Glenn Dowdy was a dispatcher and member of the executive board. They too, were union members.

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[2] Defendants spend considerable time discussing Plaintiffs' motives in reporting Aaron's suspected criminal conduct to law enforcement. (Brief on Appeal, pp. 7, 9-10.) In *Whitman v. City of Burton,* 2013 Mich LEXIS 682, *1-*2 (2013), this Court held that a whistleblower's motivation is irrelevant to the question of protected activity:

> Nothing in the statutory language of the WPA addresses the employee's motivation for engaging in protected conduct, nor does any language in the act mandate that the employee's *primary* motivation be a desire to inform the public of matters of public concern. Rather, the plain language of MCL 15.362 controls, and *we clarify that a plaintiff's motivation is not relevant to the issue whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim. To the extent that Shallal has been interpreted to mandate those requirements, it is disavowed.* Accordingly, we reverse the judgment of the Court of Appeals and remand this matter to that Court for consideration of all remaining issues, including whether the causation element of MCL 15.362 has been met. (Italics added.)

Any questions concerning Plaintiffs' alleged motivations in reporting to the DOL are irrelevant.

B. Henry's and White's Reports of Corruption to the DOL.

In early September of 2009, Business Manager Aaron instructed White to contact several unemployed union members for "training". (294a-295a; 375a-380a.) When the workers arrived at the union hall, they were advised there was no "training" and were asked to "volunteer" to remove a brick façade on the exterior of the Trade Union Leadership Council (TULC) building[3]. (294a-295a.)

Henry videotaped the "training" for posting on Local's 1191's planned website. (122a.) Henry incidentally observed that members working on the TULC lacked proper clothing and safety equipment. (405a, 407a.)

The TULC project lasted two days. Checks from Local 1191's treasury were issued for $60.00 to each of the eight "volunteers." (388a-395a; 294a-295a.) Plaintiffs suspected unlawful activity when they found these checks falsely attributed to "picket line 2 days." None of the recipients had participated in a picket line[4]. (152a-156a, 158a-160a, 373a, 375a, 380a-383a, 401a-408a.) Henry and White also understood that if the checks were for "training" they should have been issued from the Michigan Laborer's Training Institute, *not* from Local 1191's treasury. *Id.* If the work was for hire, these members should have received wages from the

[3] The TULC is a private entity separate and distinct from Local 1191. It is licensed to sell liquor and frequented by union members and members of the public. (386a.)

[4] Local 1191 Business Agent Duane Robinson, now deceased, testified that Mr. Ruedisueli was reluctant to sign the checks, "[b]ecause they had 'picket line' on them, and he knew them guys wasn't on a picket line." (417a.) Mr. Ruedisueli also admitted to Mr. White that he believed the checks were fraudulently issued. (382a-384a.)

contractor in accordance with an agreement negotiated between the union and the contractor[5]. (373a-377a.) Henry and White suspected that Aaron had misappropriated Local 1191 funds to further a kickback scheme whereby he received cash for providing free labor to the TULC. (373a-377a, 382a-384a, 404a-405a, 407a-408a.)

C. Henry's Anonymous Letter to Local 1191 Membership.

On September 25, 2009, Mr. Henry drafted and sent an unsigned letter to Local 1191 in which he outlined his suspicions that Aaron misappropriated union funds and was engaged in a kickback scheme. (404a, 419a-424a.) Misappropriation and embezzlement are felonies under 29 USC § 501(c)[6] and MCL 750.174, respectively.

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[5] Immediately above their "Introduction," Defendants refer to Keith White's deposition where he discussed that, typically, union wages are paid to workers pursuant to a collective bargaining agreement negotiated between the employer and the union. (Brief on Appeal, p. 1.) Defendants refer to this testimony to insinuate that this case involves a collective bargaining agreement. It does not. It is undisputed that neither Plaintiffs nor the TULC volunteers worked under a collective bargaining agreement and no such agreement is attached to Defendants' 1100 page appendix.

[6] 29 USC § 501(c) provides:

> Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the monies, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.

The September 25, 2009 letter referred to 29 USC § 501(c), LMRDA, which is a criminal statute. *§ 501* deals with the fiduciary duties of union officers and guards against the misuse of union funds. (419a-427a.) In addition 29 USC § § 6012 and 6015 require a taxpayer to declare and pay income. If Plaintiffs' concerns of kickbacks were accurate and the receipt of such payments went undeclared by Aaron, that would also violate state and federal laws governing the reporting of income.

D. Plaintiffs-Appellees Michael Ramsey, Henry and White Report Their Suspicions of Illegal Activity to The Department of Labor (DOL).

In October 2009, Plaintiffs-Appellees Michael Ramsey, Henry and White met with criminal investigators from the DOL to report their suspicions of Aaron's kickback scheme. (118a-120a, 294a-295a, 398a-399a, 402a-403a, 409a, 435a.) On October 19, 2009, the DOL began a criminal investigation into the activities of Local 1191 and Aaron. (294a-295a.) The DOL conducted interviews with several employees of Local 1191, including Aaron. (138a, 294a-295a.)

The DOL Investigative report explained the "*Nature of the Scheme*" reported by Plaintiffs:

> On October 19, 2009, this office opened an investigation based on allegations that Aaron, the President/Business Agent for LIUA LU 1991, stole or misused strike/picket funds in order to reimburse certain LU 1191 members who assisted on a demolition project at the Trade Union Leadership Council (T.U.L.C.); a private Detroit union-member-only club. The union contacted certain members and asked them to volunteer work/volunteer by removing a brick façade on the exterior of the building. The LU 1191 members agreed to work/volunteer; however, all of the workers initially believed that they would be attending a training seminar at the LU 1191. When the workers arrived at the LU 1191, they were advised there would be no training and that they were needed to volunteer on the project at the T.U.L.C. About one to two weeks after the project at the T.U.L.C. had been completed; the members received a check in the mail from LU 1191. All of these checks were from the picketing fund. None of the members who worked at the T.U.L.C. project had picketed. The members were informed that the picket line was to assist them with their transportation expenses while working on this volunteer project on behalf of LU 1191.
>
> Michael Aaron was interviewed and advised that he authorized checks to be issued to members that had worked on the T.U.L.C. project. Aaron stated that it was within his discretion to issue the checks from the picket fund. The total amount paid to members was less than $500.00. The AUSA [redacted].

(294a-295a.) This Investigative Report makes no reference to wages, clothing or unsafe working conditions because that was not the substance of Michael Ramsey or Henry White's reports or the focus of the DOL's criminal investigation.

E. Attorney Legghio's Internal Investigation of Union Corruption Alleged in the September 2009 Letter.

On behalf of Local 1911, its attorney, Christopher Legghio, "investigated" allegations of corruption and kickbacks described in the September 25, 2009 letter. (440a-441a.) On November 5, 2009, Mr. Legghio issued a letter which declared that "we find no violations of federal or state law." (440a.) Mr. Legghio offered the following basis for his findings:

> There is no evidence whatsoever that any Local 1191 Union officer misused their position or received any personal gain from the modest work performed at the TULC by Local 1191 ***members who volunteered*** to do this work. And, there is ***no evidence that any laborer was compelled to work at the TULC.*** All of the laborers, who performed any work at the TULC, did so ***voluntarily.***
>
> The modest payments to the laborers ($30 per day) referenced "picket line" activity. But there is no evidence that this reference was an effort to mislead anyone as to the nature of the payment. Rather, this reference appears merely inadvertent[7].
>
> Instead, the evidence is that ***some unemployed Local 1191 members voluntarily worked,*** for a short time, at the TULC. Local 1191 provided these ***unemployed volunteers*** with a modest daily stipend for their ***volunteered efforts***. This explains why the Local called the Local 1191 members to perform this ***volunteer work***—it presented an opportunity to provide ***unemployed Local 1191 members*** with some modest ***compensation for their unselfish efforts. Stated another away, the modest stipend paid to these Local 1191 members who volunteered their time and work is nothing more than [sic] the Local's effort to modestly reimburse unemployed Local 1191 members for their expenses when they voluntarily donated their work to this cause.***

(441a[8].) (Italics/Bold added.)

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[7] One might wonder what a neutral fact finder might conclude about repeated false entries on checks which serve no purpose other than to mislead. A neutral fact finder might also conclude that the omission of any reference to "training" in this letter was also not "merely inadvertent" but rather, more subterfuge.

F. Anthony Henry and Keith White's Termination Because They Reported Suspected Illegal Activity to the Law Enforcement.

On November 11, 2009, just six days after the publication of Mr. Legghio's "findings and recommendations", Aaron sent each Anthony Henry and Keith White a letter which advised: "[I]n order to prudently manage Local 1191's finances...you will not return to work at Local 1191 until notified by Local 1191." (445a, 447a.) No other reason for their termination was given. *Id.*

G. Anthony Henry's WPA Lawsuit and the Firings of Plaintiffs-Appellees Michael Ramsey and Glenn Dowdy.

On January 12, 2010, Henry and White filed their WPA Complaint, since amended, in Wayne County Circuit Court. Henry and White alleged that they were fired for reporting their suspicions of Aaron's fraudulent and illegal activity to the DOL. (3a-8a, 25a-32a, 198a.) They filed this action as "employees," not as members of the union. *Id.* They sought no vindication of any membership rights and made no reference to any federal statute. *Id.*

Business Agents Plaintiffs-Appellees Michael Ramsey and Glenn Dowdy also suspected Aaron of orchestrating a kickback scheme. (198a.) Both Plaintiffs-Appellees Michael Ramsey and Glenn Dowdy were interviewed by the DOL. (452a). After Henry and White's termination and their institution of the WPA claims against the Defendant, Michael Ramsey and Glenn Dowdy's depositions were scheduled. Mr. Ruedisueli asked Plaintiff-Appellee Michael Ramsey to lie at his deposition. (458a-461a, 467a-470a). Defendants scheduled Ramsey and Dowdy's

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[8] During discovery, Defendants reiterated that checks "made payable to those who voluntarily worked on the TULC ... were not for 'work performed.'" (136a; Also See, 135a.)

depositions for the first week of April, 2010. Mr. Ruedisueli asked Mr. Ramsey to lie at his deposition. (458a-461a, 467a-470a.) Mr. Ramsey refused. (453a-454a.) Soon after, Ramsey and Dowdy were fired. *Id.* On April 22, 2010, Ramsey and Dowdy filed their WPA lawsuit. (449a-456a.) Count II of their Complaint contained a claim for wrongful discharge in violation of public policy for Ramsey's refusal to commit a criminal act (i.e., perjury) at the direction of Defendant Ruedisueli. (454a.)

H. Defendants Motion for Summary Disposition.

Before the close of discovery, Defendants filed a motion for summary disposition pursuant to MCR 2.116(C) (4). (70a-71a.) In their Brief, Defendants argued that the LMRDA preempted Plaintiffs' state WPA claims "...because federal district courts have exclusive jurisdiction of retaliation claims by union members who exercise their LMRDA rights to *report union corruption* to the USDOL." (90a[9].) (Italics added.) In their trial court brief, as they do again here, Defendants relied heavily on the majority opinion authored by Judge Wilder in *Packowski v. United Food and Commercial Workers,* 289 Mich App 132 (2010). *Id.*

Defendants also filed a motion for partial summary disposition with regard to the *Ramsey/Dowdy* complaint which sought dismissal of the WPA claims but conceded that Mr. Ramsey's public policy claim was not preempted by the LMRDA. (189a-190a.)

The *Henry/White* and *Ramsey/Dowdy* plaintiffs filed a *Joint Brief in Response to Defendants' Motion for Summary Disposition and Partial Summary Disposition.* (347a-366a.) Plaintiffs argued that: (1) *Packowski* expressly limited its review and holding to the issue of just-

[9] Nowhere in their trial court or Court of Appeals Brief did Defendants claim that Plaintiffs were discharged because they complained about union wages or work safety or to aid or protect the TULC volunteers. Nor did Defendants argue that the NLRA preempted Plaintiffs' WPA claims.

cause employment and had nothing to do with *any* Michigan statutory claim, including the WPA (which was never even mentioned in *Packowski*); (2) the WPA is a codification of Michigan public policy in which the State has a deeply rooted interest in encouraging and protecting employees who report suspected illegal activity by their employers to law enforcement--including corruption by union leadership; (3) the WPA is consistent with and advances the dual purposes of the LMRDA; namely, to promote democracy and stop union corruption; (4) the savings provisions contained in the LMRDA preserved Plaintiffs' state law remedies to the extent the federal statute applied and (5) *Packowski's* reference to § 412 of the LMRDA was nothing more than *obiter dicta. Id.*

I. The Trial Court's Denial of Defendants' Motions.

The trial court rejected Defendants' motion. (602a-603a.) The trial court found that the LMRDA did not preempt Plaintiffs' WPA claims because: (1) the *Packowski* majority twice stated that the *only* question for review was whether the business agent's discharge violated his union employer's just-cause standard–a claim not present in either the *Henry/White* or *Ramsey/Dowdy* cases (*Packowski, supra,* at 134[10], 136[11]); (2) *Packowski* did not involve a WPA claim; (3) the WPA codified Michigan public policy and was consistent with the policy underlying the LMRDA; (4) the savings provisions of the LMRDA preserved Plaintiffs' state claims, and; (5) *Packowski's* reference to § 412 of the LMRDA in footnote 3 was *not* the court's holding, nor did it preempt state subject matter jurisdiction.(588a-594a.)

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[10] "The sole issue before us on appeal is plaintiff's claim that he was terminated without just cause."

[11] "This appeal involves the defendant's summary disposition motion regarding plaintiff's cause of action involving wrongful termination in violation of defendant's just-cause policy."

J. The Court of Appeals Affirms the Ruling of the Trial Court.

After entry of the *Order Denying Defendants' Motion for Summary Disposition*, The Court of Appeals granted Defendants Application for Leave to Appeal. (742a.) Following the submission of briefs and oral argument, a panel of the Court of Appeals comprised of Judges Krause, Saad and Wilder, affirmed the trial court's ruling. *Henry v. Laborers Local 1191,* 2012 Mich App LEXIS 1319 (July 12, 2012, Unpublished) (**Ex. A.**) (866a-891a.)

In their *per curiam* opinion, the Court of Appeals thoroughly analyzed preemption principles and the purposes underlying the WPA, LMRDA and NLRA. The Court found "[o]f particular significance, plaintiffs' claims arose out of their employment by Local 1191." *Id.* at *5. This court recognized that the LMRDA protects the rights of rank-and-file members, not the rights of union employees." *Id.* at *5-*6, citing *Finnegan v. Leu,* 456 US 431, 435, 437, 441; 29 USC §§ 411-415.

The Court of Appeals then clarified what *Packowski* did, and did *not*, hold:

> Significantly, however, *Packowski* only considered the "plaintiff's claim that he was terminated without just cause." *Id.* at 134. Consequently, an exception to preemption, recognized in other cases, where a union employee claims wrongful discharge for refusing "to commit or aid in committing a crime," did not apply because the plaintiff in *Packowski* was terminated for failing to follow legitimate policies, not for refusing to commit or aid in committing a crime. *Packowski,* 289 Mich App at 146. This Court also noted that any claim for retaliation for participating in the Department of Labor investigation could be brought in federal court under § 412. *Packowski,* 289 Mich App at 146 n 3. *This Court did not purport to decide whether doing so was the only way for such a party to seek relief, and we likewise do not so here.* (Italics added.)

Henry, supra at *6-*7. The Court rejected Defendants' argument that *Packowski* preempted Plaintiffs WPA claims.

The Court, *supra* at *7-*8, next discussed why Plaintiffs' WPA claims were not conflict preempted by the LMRDA:

> We appreciate Defendants' concerns that a patronage suit *could* masquerade as some other wrongful discharge suit, so it's especially important for plaintiffs to show a causal connection between their reporting and the discharge in order to the establish their prima facie case. [Citation omitted]. Furthermore, "[t]he trial court must exercise caution...to minimize introduction of any evidence that Plaintiff's political views differed from those of [the Business Manager] in order "to assure that the doctrine of preemption is not violated." *Montoya,* 755 P2d at 1224. However, plaintiffs contended that defendant's acts were criminal and involved more than "the federal regulatory scheme and the union's own internal operating policies." *Dzwonar,* 348 NJ Super at 173. Protecting terminations where an employee reports a crime, thereby refusing to conceal it, would also "encourage and conceal" criminal acts and coercion "and would not "serve union democracy." *Bloom v Gen Truck Drivers, Office Food & Warehouse Union, Local 952,* 783 F2d 1356, 1362 (CA 9, 1986). Accordingly, plaintiffs' WPA claim is not conflict preempted by the LMRDA.

The Court also found no field preemption and noted that "in general the LMRDA protects the rights afforded union members because of their status as *members,* not the rights afforded *union employees* because of their status as employees." *Packowski,* 289 Mich App at 152 n. 1 (Beckering, P.J., dissenting), (italics in original) citing *Finnegan,* 456 US at 436-437. "Here, plaintiff's brought their claims as employees and have not alleged any infringement on their membership rights, so they have no cause of action under § 412. See *Bloom,* 783 F2d 1359. [footnote omitted.]" *Henry, supra* at *8-*10.

Lastly, the Court rejected Defendants' new argument that Plaintiffs' WPA claims were preempted by the NLRA. The Court discussed NLRA preemption as explained in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 US at 245. The Court recognized that *§ 8* of the Act provided protection for unfair labor practices such as refusing to fire organizing workers, testifying before the NLRB or assisting in an NLRB investigation.

Henry, supra at *10, citing *Calabrese v. Tendercare of Mich, Inc,* 262 Mich App 256, 260, 262-263 (2004); *Flores v. Midwest Waterblasting Co,* 1994 Dist LEXIS 17704 (DC MI 1994) **(Ex. B)** at *26 and *26 n 4 (NLRA does not exempt state whistleblower claims when an employee reports to an agency other than the NLRB). The *Henry* court found that Plaintiffs were not involved in anti-union activities and never filed any charge with the NLRB. The Court further ruled:

> Alternatively, in *Roussel v. St Joseph Hosp, 257 FSupp 2d 280, 285 (D Maine, 2003),* the court found that a Maine Whistleblowers' Protection Act claim was not preempted by the NLRA. The court found that even if the plaintiff had engaged in concerted activity, her claim that she was terminated in retaliation for exercising her rights under the Maine Whistleblowers' Protection Act was peripheral to the NLRA. *Id.*
>
> Plaintiffs asserted that they reported their "suspicions of illegal activity" to either the United States or Michigan Department of Labor, not to the NLRB. Furthermore, we agree with the reasoning in *Roussel.* A claim for retaliatory discharge arising out of an employee's report of suspected illegal activity or participation in investigation thereof is only of peripheral concern to the NLRA's purpose of protecting employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Roussel, 257 F Supp 2d at 285.* Therefore, plaintiffs' WPA claims are not preempted.

Henry, supra at *12-*15.

K. This Court Grants Defendants' Application for Leave to Appeal.

Defendants filed an Application for Leave to appeal to this Court. (606a-637a.) On February 13, 2013, this Court granted Defendants application and instructed the parties to address the following questions: (1) whether, regardless of the public body involved, the NLRA or the LMRDA preempt the WPA, if the challenged conduct actually or arguably falls within the jurisdiction of the NLRA or the LMRDA; (2) whether a union employee's report to a public body of suspected illegal activity or participation in an investigation thereof is of only peripheral

concern to the NLRA or the LMRDA so that the employee's claims under the WPA are not preempted by federal law; and, (3) whether the state's interest in enforcing the WPA is so deeply rooted that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the state of the power to act. *Henry v. Laborers Local 1191,* 493 Mich 934, 935 (2013). As discussed below, neither the LMRDA nor NLRA preempt Plaintiffs' WPA claims.

ARGUMENT[12]

I. THE LMRDA DOES NOT PREEMEPT THE WPA.

Standard of review

The question of federal preemption is one of law, and therefore is one for the court. *City of Detroit v. Ambassador Bridge Co.,* 481 Mich 29, 35 (2008). MCR 2.116(C) (4) permits a court to dismiss a case for lack of subject matter jurisdiction. Under MCR 2.116(C) (4), this Court determines whether the affidavits together with the pleadings, depositions, and documentary evidence demonstrate a lack of subject matter jurisdiction. *L & L Wine & Liquor Corp. v. Liquor Control Comm'n,* 274 Mich App 354, 356 (2007). This Court reviews the grant or denial of a motion for summary disposition *de novo. Groncki v. Detroit Edison Co,* 453 Mich 644, 64 (1996). Further, the existence of subject-matter jurisdiction and a determination of preemption, which involves statutory interpretation, are likewise reviewed *de novo. Thomas v. United Parcel Service,* 241 Mich App 171 (2000).

[12] Plaintiffs-Appellees Michael Ramsey and Glenn Dowdy want the Court to know the legal arguments presented are identical to those presented by the Co-Plaintiffs-Appellees. The only difference in the brief is the Introduction, Summary of Arguments, Counter-Statement of Facts set forth and the facts pertaining to Ramsey/Dowdy case.

A. The Purpose of the WPA and LMRDA.

1. The Purpose of the WPA.

Michigan's Whistleblower Protection Act WPA provides, in pertinent part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to the law of this state, a political subdivision of this state, or the United States to a public body...

MCL 15.362. The statute was enacted in 1980 to "provide protection to employees who report a violation or suspected violation of state, local or federal law...." Preamble 1980 PA 469. (851a-852a.) When enacting the WPA, the Michigan legislature recognized that employees are in a unique position to discover corruption otherwise concealed by their employers, and, that without statutory protections, employees would be reluctant to report their suspicions for fear of losing their jobs or some other form of retaliation. See, e.g. *Ernsting v. Ave Maria College,* 274 Mich App506, 514[13] (2007), *app. denied* 480 Mich 985 (2007); *Dudewicz v. Norris-Schmid, Inc.,* 443 Mich 68, 75 (1993), *overruled in part on other grounds by Brown v. Mayor of Detroit,* 478 Mich 589 (2007). This civil rights statue provides for personal liability, statutory attorney fees, compensation for economic and non-economic damages as well as equitable relief. MCL 15.361(b), (c); MCL 15.363 (3); MCL 15.364.

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[13] Federal law enforcement agencies, like the DOL, are considered public bodies for the purposes of the WPA. MCL 15.361(d) (v). See *Ernsting v. Ave Maria College,* 274 Mich App 506, 514 (2007), *app. denied* 480 Mich 985 (2007); *Robinson v. Radian, Inc. of Va.,* 624 FSupp 2d 617 (ED MI 2008).

As this Court recently explained in *Whitman, supra* at *11:

> The WPA furthers this objective by removing barriers that may interfere with employee efforts to report those violations or suspected violations, thus establishing a cause of action for an employee who has suffered an adverse employment action for reporting or being about to report a violation or suspected violation of law. (citing *Dolan v. Continental Airlines/Continental Express,* 454 Mich 373, 378-379 (1997).)

Here, Defendants violated the WPA when they fired Plaintiffs because they "blew the whistle" about Aarons suspected criminal activity to the DOL.

2. The Purpose of the LMRDA.

The LMRDA "was the product of congressional concern of abuses of power by union leadership" and provided certain protections to union members. *Finnegan v. Leu,* 456 US 431, 435 (1982)[14]; *Bloom v. General Truck Drivers,* 783 F2d 1356, 1361 (9th Cir 1986). "In providing such protections, Congress sought to further the basic objective of the LMRDA: 'ensuring that unions [are] democratically governed and responsive to the will of their memberships.'" *Finnegan* held that these protections–i.e. the right of free speech, assembly, etc. identified in 29 USC § 411, also known as the union member's "Bill of Rights" contained in Title I of the Act, applied only to rank-and-file union members and *not* union officers or employees. *Finnegan,* 456 US at 437.

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[14] In *Finnegan,* Leu defeated the incumbent in a union presidential election. Leu proceeded to terminate business agents who campaigned against him. The Supreme Court held that the LMRDA permitted the union president under those circumstances to appoint agents of his choice to carry out his policies because it furthered the democratic process. 456 US at 441-442. *Finnegan* had absolutely nothing to do with reports of suspected illegal activity to law enforcement, or any other claims remotely similar to those alleged by Plaintiff-Appellees. See, *Cehalich v. UAW,* 710 F2d 234 (6th Cir 1983) (a member and employee of a union who was fired because he opposed a tentative labor agreement negotiated by union leadership could not avail himself of any membership protections contained in the LMRDA because his membership status was not impacted, and under *Finnegan,* the union leadership acted within its rights when it fired him for his political opposition to the tentative labor agreement) and *Vought v. Wisconsin Teamsters Joint Council, No. 39,* 558 F3d 617, 622-623 (7th Cir 2009) (business agents' termination by their political opponent was not "anti-democratic" and thus they had no protection under the LMRDA.)

B. Preemption Analysis.

Congress has the power to preempt state law. *US Const, art 6, cl 2.* However, Michigan courts generally presume that it does not, *Duprey v. Huron & Eastern R Co, Inc,* 237 Mich App 662, 665 (1999), and that presumption can be overcome only where Congress clearly and unequivocally intends to do so. *Wayne Co Bd of Comm'rs v. Wayne Co Airport Authority,* 253 Mich App 144, 198. Preemption may be "express," where Congress has explicitly stated its intent to preempt state law; "field," where state law regulates conduct in a field that Congress has intended to occupy exclusively; or "conflict," where state law is in actual conflict with federal law. *Grand Trunk Western Railroad Co v. City of Fenton,* 439 Mich 240, 243-24 (1992). The LMRDA does not contain express preemption provision for state law claims. *Chamber of Commerce of the United States v. Brown,* 554 US 60, 65 (2008); *Brown v. Hotel & Restaurant Employees and Bartenders,* 468 US 491, 505-506 (1984); 29 USC § 523(a) (LMRDA has no express preemption provision.)

Field preemption requires federal law to occupy a field so thoroughly that it is inferable that Congress did not intend to permit states to supplement it. *Cipollone v. Liggett Group, Inc,* 505 US 504, 516 (1992). The LMRDA does not occupy the entire field of regulation with respect to union employees because it contains a savings clause that provides that "except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or the law of any State." *O'Hara v. Teamsters Union Local No. 856,* 151 F3d 1152, 1161 (9th Cir 1998) (citing 29 USC § 523). Also See, 29 USC § 524.

Conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements," or where the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English v. General Electric Co,* 496 US 72, 79 (1990) (citation omitted). Whistleblower protection for employees who expose corruption by union leadership is a complement to, and not in conflict with, the democratic purposes of the LMRDA. See *Smith, supra,* 109 Cal App 4th at 1649-1650.

C. LMRDA Preemption Analysis Applied to Plaintiffs' WPA Claims.

1. *Finnegan, Packowski* and other authority support state court jurisdiction over Plaintiffs' WPA claims.

Defendants cite *Finnegan v. Leu, supra,* in support of its argument for LMRDA preemption. *Finnegan* held *only* that the elected leadership may terminate policy-making or policy-implementing employees at will to reflect the democratic mandate of the membership. 456 US at 436-437. Neither the LMRDA nor *Finnegan,* however, gives union officials unlimited discretion in employment matters. Specifically, they may not deprive union employees of public policy and statutory state law claims designed to protect employees from retaliation. See, e.g. *Smith v. Int'l Brotherhood of Electrical Workers, Local Union 11,* 109 Cal App 4th 1637, 1649-50 (2003); *Bloom, supra,* 783 F2d at 1361; *Ardingo v. Local 951 and United Food Commer. Workers Union,* 333 Fed Appx 929, 936 (6th Cir 2009, unpublished, **Ex. C**); *Montoya v. Local Union 111 of Int'l Brotherhood of Electrical Workers,* 755 P2d 1221, 1224 (Colo App 1988); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n.,* 505 US 88, 98 (1992); *Hines v. Davidowitz,* 312 US 52, 67 (1941).

Defendants rely heavily on the majority opinion of *Packowski v. United Food and Commercial Workers, supra*, in which the Michigan Court of Appeals found that conflict preemption, barred a discharged union employee from bringing a state law breach of contract claim against his union employer. 289 Mich App at 149. The *Packowski* majority unequivocally stated that its decision was limited to the issue of whether or not the union employee was fired in violation of his employer's just-cause policy. *Id.* at 134, 136. *Packowski* has no application here.

Without acknowledging this limitation, Defendants ask this Court to expand the narrow holding and apply it to an issue *Packowski* never even considered: whether the LMRDA preempts a union employee's WPA claim for reporting suspected illegal activity to law enforcement. As reasoned by the both courts below, *Packowski* offers Defendants no assistance.

Packowski involved a business agent who claimed that he was demoted and later discharged. He sued in state court to enforce his union-employer's just-cause employment policy. *Id.* at 134-135. The employer claimed that the employee was discharged because he failed to follow legitimate policies, such as itinerary and mileage recording. *Id.* The trial court found that the LMRDA preempted the employee's common law breach of contract claim.

On appeal, the *Packowski* majority cited *Screen Extras Guild, Inc. v. Superior Court,* 800 P2d 873, 876-79 (Cal 1990); *Finnegan, supra; Vitullo v. Int'l Brotherhood of Electrical Workers,* 75 P3d 1250 (2003); *Tyra v. Kearney,* 153 Cal App 3d 921, 923-926 (1984); *Smith v. Int'l Brotherhood of Electrical Workers, Local Union 11; supra*; and *Dzwonar v. McDevitt,* 791

A2d 1020, 1022 (NJ 2002), *aff'd on other grounds,* 828 A2d 893 (NJ 2003), to find that the employee's common law breach of contract claim conflicted with the purposes of the LMRDA and thus, was preempted. 289 Mich App at 148-149[15].

In an opinion authored by Judge Wilder, the *Packowski* majority reasoned that: "[T]he democratic purposes of the LMRDA would be contravened by allowing a demoted or discharged business agent or organizer to sue for wrongful discharge." *Id.* at 144. The same is not true, however, for an employee discharged for reporting union corruption to authorities. The democratic objectives of the LMRDA do not conflict with WPA or public policy claims which implicate criminal violations of federal and state laws by union leadership. See *Smith, supra* at 104 Cal App 4th at 1649-50; *Bloom, supra,* 783 F2d at 1360, and *Dzwonar, supra,* 791 A2d at 1026.

The cases relied upon by the *Packowski* majority, except for *Dzwonar* and *Smith,* involved "garden variety" wrongful discharge claims, or "patronage" discharges. *Screen Extras, supra,* involved a business agent who sued for a common-law claim of good faith and fair dealing after being fired for dishonesty and insubordination. *Vitullo, supra,* and *Tyra, supra,* involved union employees who, respectively, lost elections and were subsequently fired by their victorious political rivals. The *Screen Extras, Vitullo,* and *Tyra* courts found federal preemption of the employees' state law "just cause" claims because the firings were within the prerogative of

[15] The *Packowski* majority, 489 Mich App at 147-148, found unpersuasive the unpublished Sixth Circuit case of *Ardingo v. Local 951, United Food and Commercial Workers Union,* 333 Fed App 929 (6th Cir 2009). *Ardingo* held that a business agent's state law claim to enforce a just-cause contract with his union did not conflict with the purposes of the LMRDA, *Id.* at 934. The *Ardingo* court reasoned that since the union was authorized to enter into just-cause employment contracts with its employees, there was no justification for preemption of the employee's state law breach of contract claim. *Id.*

the elected business manager and consistent with the democratic purposes of the LMRDA. *Screen Extras,* 800 P2d at 800; *Vitullo,* 752 P3d at 1252-1255; *Tyra,* 154 Cal App 3d at 921-923.

Plaintiffs' WPA claims are of a far different nature than the common law "just-cause" or patronage firings discussed above. Plaintiffs' were fired because they contacted the DOL to report their belief that their boss was involved in a kickback scheme and misusing union funds –a violation of federal and state criminal laws. The WPA expressly prohibits any discriminatory or retaliatory conduct against an employee who reports suspected violations of state or federal laws to a law enforcement agency. MCL 15.362. For good reason, these claims are not preempted by the LMRDA. See, e.g. *Smith, supra,* 109 Cal App 4th at 1649-1650.

In *Smith, supra,* an employee sued his union employer and its business manager for wrongful discharge in breach of contract, violation of public policy against age discrimination, and disability discrimination codified by California's Fair Employment and Housing Act, CA Code § 12900, *et. seq.* While the *Smith* court found that the LMRDA preempted the employee's common law breach of contract claim, it held that the employee's statutory claims were not preempted.

The *Smith* court explained:

> The *Screen Extras* opinion left two questions unanswered. Does the class of claims preempted by the LMRDA include those brought by *non*policymaking employees? **Does the preempted class of claims include claims of employment discrimination based on sex, race, age, disability, religion and the like?**
>
> For the reasons explained below, we need not address the first question because the undisputed evidence shows Smith was a member of the union's policymaking staff. **As to the second question, the short answer is: not in *this* century; not in *this* court.** [Italics in original; bold added.]
>
> * * * * *

Adopting the union's view of LMRDA preemption would have ramifications far beyond upholding "the ability of an elected union president to select his own administrators."

CONSIDER:

One of the seminal California cases establishing the tort of wrongful termination in violation of public policy was brought by Peter Petermann, a union business agent, who was fired for disobeying his supervisor's instruction to lie in the testimony he gave before a California legislative committee. Reversing judgment for the union complaint for wrongful discharge our Supreme Court stated: "To hold that one's continued employment could be made contingent upon his commission of a felonious act at the insistence of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs. This is patently contrary to the public welfare." **It would be ironic indeed if a law enacted to "curb abuses of power by union leadership" was used instead to protect such abuses. In the same vein, employees could be discharged without recourse for blowing the whistle on bribery, kickbacks and tax evasion. If the LMRDA preempts a union employee's cause of action for wrongful discharge in violation of public policy, the deterrent effect of such suit is lost "and nothing prevents unscrupulous employers from forcing employees to choose between committing crimes and losing their jobs."** (Citing *Bloom, supra* at 1361.) 109 Cal App 4th at 1649-50.[16] (Bold added)

Similarly, in *Dzwonar, supra,* a case cited by the *Packowski* majority and given great weight by Defendants, a New Jersey appellate court found that an employee's claim under the Conscientious Employee Protection Act (CEPA) was preempted by the LMRDA. The *Dzwonar* plaintiff was employed by the defendant union as an arbitration officer who was fired by the union's president. She complained that the union failed to read its minutes to the general membership in violation of the union's internal policies. The plaintiff's CEPA claim "...did not

[16] See, *Montoya v. Local Union III,* 755 P2d 1221, 1223-24 (Colo App 1988) (terminated employee's breach of contract claim preempted by the LMRDA but public policy claim based on refusal to conceal violation of criminal statute or aid in such violation was not preempted because it advances the interests of the LMRDA and any impact on the federal statute is merely peripheral.) Also See, *Hawaiian Airlines Inc. v. Norris,* 512 US 246, 266 (1994) (Railway Labor Act did not preempt plaintiff's claims for violation of Hawaii's Whistleblower Protection Act.)

contend that any of the actions were violations of law in themselves. Instead, she asserted that the Executive Board violated the law by failing to inform and obtain approval from the general membership on those actions based on internal procedures contained in the union's bylaws." *Dzwonar*, 791 A2d at 1022.

The *Dzwonar* court recognized that CEPA was designed to give "broad protections against employer retaliation" for employees acting in the public interest. *Id.* "***Nonetheless, we believe this CEPA claim is preempted by the LMRDA because it is based solely on an alleged LMRDA violation implicating neither federal nor state criminal law.***" (Italics/Bold added). The *Dzwonar* court reasoned:

> Preemption of state law in this context is governed by the LMRDA, which admittedly contains no express limitation of the right of states to protect union employees from discharge in retaliation for conduct falling within a law such as the CEPA. Nevertheless, we believe such a limitation may be inferred from the federal acts scope, **at least where the purported violation of law does not involve criminal conduct.** (Bold added).

Id. at 1024. Because "this case involves, at most, the federal regulatory scheme and the Union's own internal operating policies" the CEPA claim was preempted.[17] *Id.*

Importantly, the Court of Appeals noted this crucial language in *Dzwonar's* reasoning. Defendants, however, completely omit and ignore this clear caveat in the hope that this Court will follow suit. ***Obviously, the Dzwonar court would not have preempted the plaintiff***

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[17] On appeal, the New Jersey Supreme Court stated: "Because Plaintiff has failed to establish a CEPA claim, we need not comment on the Appellate Division's holding that federal labor law preempts a state law claim for common law or statutory wrongful discharge when the claim implicates a union's internal policies and fails to allege that criminal conduct has occurred." *Dzwonar v. McDevitt,* 828 A2d 893, at 904 (2003). Here, Plaintiffs alleged that Aaron was engaged in criminal conduct.

employee's state law retaliation CEPA claim had she implicated a violation of federal or state criminal laws, as Plaintiffs do in our case. See, e.g., 29 USC § 501(c) and MCL 750.174; *Packowski, supra,* at 143-144. After a full and fair reading, both lower courts found that *Dzwonar* was readily distinguishable and did not preempt Plaintiffs' WPA claims.

Smith, Montoya, Bloom and *Dzwonar* establish that the LMRDA does not preempt Plaintiffs' WPA claims just as the LMRDA does not preempt Michael Ramsey's public policy claim in the *Ramsey/Dowdy* case. As explained in *Smith,* whistleblowers, like Plaintiffs, who expose corruption, kickbacks, embezzlement and other criminal activity by union leaders, compliment and advance the democratic and corruption deterrent objectives at the heart of the LMRDA. It would be illogical and contrary to the *raison d'être* of the LMRDA to permit an employee to pursue a public policy claim against his union employer based on the employee's refusal to commit a crime but deny that employee's state law WPA claim that he was fired because he reported the crime to law enforcement. The very purpose underlying the public policy exception to LMRDA preemption applies with equal force to Plaintiffs' WPA claim. **"It would be ironic indeed if a law enacted to curb 'abuses of power by union leadership' was used instead to protect such abuses."** *Smith* at 1650. (Bold added). This "irony" is exactly what Defendants suggest this Court embrace.

In addition, the evidence, pleadings and discovery responses establish that Henry and White's discharge had nothing to do with patronage, political opposition or breach of contract, as was the case in *Finnegan, Screen Extras, Vitullo* and *Tyra.* The November 11, 2009 letters of "indefinite layoff" (i.e., termination) given to Plaintiffs within six days of the May 5, 2009

publication of attorney Legghio's "findings and recommendations", attributed their discharge solely to "the Local's finances and the projected work hours...." (445a, 447a.)

Moreover, Defendants never asserted the affirmative defense of patronage discharge as to Plaintiffs required by MCR 2.111(F) (3)[18]. (40a.) The undisputed fact that Aaron (with benefit of seasoned labor counsel) never dated, delivered or utilized pre-signed letters of resignation, is compelling proof that Plaintiffs' firings had nothing to do with patronage, politics or the democratic process but everything to do with their WPA protected activity. (131a, 132a.)

The WPA and LMRDA have a common purpose—to expose and root out corruption. Plaintiffs' WPA claims do not conflict with the LMRDA. There is no preemption. This Court, therefore, should deny Defendants' Appeal and affirm the rulings of the trial court and Court of Appeals.

2. The State Has a Strong Interest in Protecting Employees Who Report Suspected Illegal Activity by Their Employer to Law Enforcement.

The *Packowski* court, *supra* at 145-148, also discussed *Bloom v. General Truck Drivers,* 783 F2d 1356, 1360 (9th Cir 1986), to distinguish breach of contract claims preempted by the LMRDA from public policy claims not subject to preemption because of the state's strong interest in allowing such claims to proceed in state court. *Bloom* involved a business agent who claimed he was "...fired for refusing to alter the minutes of a union meeting to cover up an

[18] Failure to timely raise an affirmative defense results in waiver of the defense. See, *Walters v. Nadell*, 481 Mich 377, 389 (2008).

unapproved expenditure (in effect an embezzlement) of union funds by other officers" in violation of the California penal code. *Id.,* 783 F2d at 1360-1361. "Preemption questions clearly require us to balance state and federal interests, although the relative importance attached to each interest is unclear." *Id.* at 1360.

The *Bloom* Court added:

> In the present case, Bloom argues that he was fired, not for political reasons, or for no reason at all, but rather because he refused to illegally alter the minutes of a union meeting. Not only is the state's interest in allowing the wrongful discharge charge action here strong, as discussed above, but the federal interest is much lessened under these circumstances. The kind of discharge alleged, retaliation for refusal to commit a crime and breach a trust, is not the kind sanctioned by the Act, or by the Courts in *Finnegan* or *Tyra.* ***Protecting such a discharge by preempting a state cause of action based on it does nothing to serve union democracy or the rights of union members; it serves only to encourage and conceal such criminal acts.***

Bloom, 783 F2d at 1362 (Italics/Bold added).

Like the union employee in *Bloom,* Plaintiffs do not claim that they were fired for political reasons or no reasons at all. Instead, Plaintiffs allege they were fired because they reported their employers' suspected criminal activity to law enforcement. Like in *Bloom*, the state's public policy interest in enforcing the protections of the WPA and allowing union employees to litigate such a claim in state court is "strong."

Michigan public policy prohibits discharge of an employee because he refused to commit a crime and forbids "...the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Suchodolski v. Mich. Consolidated Gas Co.,* 412 Mich 692, 694-695 fn. 2 (1982). The WPA is a codification of Michigan public policy. *Id.* It

forbids employers from retaliating against whistleblowers because the public interest in exposing illegal conduct by an employer is substantial and beneficial to the State.

Without whistleblower protection for union employees, like Plaintiffs, corruption by union leadership may very well remain concealed and undetected. It is equally undeniable that the WPA advances the democratic purposes of the LMRDA by exposing suspected criminal activity by union leadership. Consequently, any impact of allowing Plaintiffs' WPA claims to proceed in state court is "merely peripheral to the concerns of the Act" and not an obstacle to the accomplishment of the objectives of the statute. *Bloom, supra* at 1362 (citations omitted). Under the balancing test explicated in *Bloom,* the LMRDA does not preempt Plaintiffs' WPA claims. The trial court, therefore, correctly ruled that it had subject matter jurisdiction.

3. Section 412 of LMRDA Has No Application to Plaintiffs' WPA Claims.

In a footnote, the *Packowski* majority wrote:

> We note that, to the extent that plaintiff has a claim of being demoted or fired in retaliation for participating in a Department of Labor investigation [into defendant's election activities], he has an action for such claim in a federal court. **29 USC § 412 provides for a civil action in federal court if there is retaliation based on giving truthful testimony to the Department of Labor.[19] (Bold added.)**

289 Mich App at 146 n. 3. Plaintiffs never testified to the DOL. Nevertheless, Defendants latch on to this footnote, which at best is nothing more than *obiter dicta,* to argue that 29 USC § 412[20]

[19]The bolded portion of this passage was omitted by Defendants in their Briefs filed in the lower courts and this Court. This is an example of Defendants' practice of ignoring or intentionally omitting material language which undermines their argument.

[20] "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions)

provided Plaintiffs an exclusive federal cause of action for retaliation based on their reports to the DOL of Defendants suspected crimes. The *Finnegan* Court held that § 412 applies *only* to union members who believe their membership rights were infringed upon[21]. Section 412 has no application here because Plaintiffs filed this action in their capacity as employees and never claimed that their membership rights were imperiled or diminished.

The Panel below noted both *Finnegan* and Judge Beckering's dissent in *Packowski* to find that § 412 did not apply:

> As noted by the dissenting opinion in *Packowski*, "in general the LMRDA protects the rights afforded union *members* because of their status as members, not the rights afforded appointed union *employees* because of their status as employees." *Packowski, 289 Mich App at 152 n 1* (Beckering, P.J., dissenting), citing *Finnegan, 456 U.S. at 436-437* (emphasis in original). In *Bloom*, the plaintiff's claim was actually based on his firing as a business agent, which was not intended to be prohibited by the LMRDA. *Bloom, 783 F2d at 1359*, citing *Finnegan, 456 U.S. at 436-437*. Without an infringement on the plaintiff's rights as a union member, the plaintiff had no cause of action under *§ 411* and *§ 412. Bloom, 783 F2d at 1359*. ***Here, plaintiffs brought their claims as employees and have not alleged any infringement on their membership rights, so they have no cause of action under § 412.*** See *Bloom, 783 F2d at 1359*.

Henry, supra at *9-*10 (footnote omitted) (Italics/Bold added.) The Court, including Judge Wilder, the author of the majority opinion in *Packowski,* made clear that *Packowski* is not nearly as expansive as Defendants insist.

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as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

[21] Under *Finnegan, supra* at 436-437 n. 7, Plaintiffs cannot avail themselves of § 412 because Plaintiffs do not claim that their status as union members were affected or infringed upon. A union *employee* who is discharged in a way that does not affect his rights as a union *member* has no cause of action under § 412.

Defendants also argue that *Ardingo v. Potter,* 445 F Supp 2d 792 (WD MI 2006) supports preemption. *Ardingo* involved a business agent who refused to contribute $5,000.00 to a defense fund established to reimburse union officers being investigated by the DOL, including the union's president. The *Ardingo* plaintiff also announced that he was running for vice-president of the union in the upcoming election. After his announcement, the *Ardingo* plaintiff alleged that his union's president "proclaimed" that plaintiff was a traitor; that he was assisting those opposed to the re-election of the union president; that he was assisting the DOL in an unwarranted and spurious investigation, and; that he would be fired after the election. *Id.* at 794.

Sometime *after* the president's proclamation, Plaintiff cooperated with the DOL and testified before the grand jury concerning financial improprieties by the president. After his termination, the *Ardingo* plaintiff filed suit claiming: (1) that the union and its president had violated his freedom of speech to comment on union affairs in contravention of § 411(a)(2) and (a)(5); (2) that defendants unlawfully disciplined him for failing to make special assessment payments under the LMRDA; (3) that defendants violated Michigan public policy by terminating him for exercising his free speech rights guaranteed him under LMRDA, and; (4) that defendants wrongfully terminated him in violation of his employer's just-cause policy. *Id.* at 794-795.

In granting in part and denying in part the union's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the *Ardingo* court dismissed the employee's public policy claim. *Id.* at 798. The court reasoned:

> Plaintiff's theory of wrongful discharge against Michigan public policy is that he was discharged for exercising his free speech rights under the LMRDA. However, "[a]s a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative." *Dudewicz v.*

> *Norris-Schmid, Inc.*, 443 Mich 68, 75, 86, 503 (1993). The Court is unaware of any common law right to be free from reprisal when commenting on matters concerning a labor organization. Therefore, the Court finds that the LMRDA provides Plaintiff's exclusive remedy for any retaliation generated by his free speech. Consequently, summary judgment is appropriate on his wrongful discharge against Michigan public policy claim.

Id. at 798-799. (Footnoted omitted).

As noted by the Panel below, *Ardingo* offers Defendants no safe harbor:

> Defendants also cite *Ardingo v Potter, 445 F Supp 2d 792 (W D Mich, 2006)*, for support of their argument that the LMRDA provides plaintiffs' exclusive remedy. However, in *Ardingo*, the plaintiff's wrongful discharge claim was based on exercising his free speech rights under the LMRDA. *Ardingo, 445 F Supp 2d at 798.*

Henry, supra, at *3 n. 2. The Court of Appeals, therefore, properly rejected Defendants' efforts to miscast Plaintiffs' classic WPA case as a "free speech" claim intended to protect union members, not union employees[22]. *Id.* at *10.

Defendants' assertion that Plaintiffs' WPA claims "thoroughly implicates the LMRDA scheme" is false. Plaintiffs' WPA claims are premised on state law which forbids their terminations because they reported suspected criminal activity to law enforcement. The only relevance that the LMRDA has in this case is that § 501(c) makes it a crime to steal union funds.

MCL 15.362 expressly provides that an employee is protected from discharge when he reports a suspected violation of federal law (i.e. 29 USC § 501(c)) to law enforcement. MCL 15.361(d) (v). Plaintiffs engaged in protected activity under the WPA, and Defendants knowingly violated the law when they fired the Plaintiffs for doing so. Moreover, Plaintiffs reports to the DOL implicate other state and federal criminal laws, such as embezzlement and tax

[22] *Ardingo* did not involve a WPA claim.

evasion. The LMRDA, therefore, does not deprive the trial court of subject matter jurisdiction over Plaintiffs' WPA claims.

II. THE NLRA DOES NOT PREEMPT PLAINTIFFS' WPA CLAIMS.

A. The NLRA and *Garmon* Preemption.

1. The NLRA.

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy. See, 29 USC § 151. The primary purpose of the Act is to "safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining . . . without restraint or coercion by their employer." *NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1, 33, 57 (1937); 29 USC §§ 151, 158. "The ultimate objective of the National Labor Relations Act, as the Supreme Court has explicitly stated, is 'industrial peace.'" *Id. at 10* (citing *Auciello Iron Works, Inc. v. NLRB,* 517 US 781, 785 (1996)). The NLRA, however, does not undertake to protect union members in their rights as members from arbitrary conduct by unions and union officials. *International Association of Machinists v. Gonzales*, 356 US 617, 620 (1958).

Under *§7* of the NLRA, employees possess "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and have the right to refrain from such activities. 29 USC § 157.

The NLRB is empowered "to prevent any person from engaging in any unfair labor practice." *Id.* at § 160(a). *§ 8* of the NLRA makes it is an unlawful labor practice for employers "to interfere with, restrain, or coerce employees" in their exercise of *§ 7* rights. 29 USC § 158(a) (1).

2. *Garmon* Preemption.

The NLRA does not contain an express preemption provision. *Metro Life Ins v. Massachusetts,* 471 US 724, 747 (1985). Nor does it reveal "a congressional intent to usurp the entire field" of labor relations. *Brown v. Hotel and Rest Emps & Bartenders Int'l Union Local 54,* 468 US 491 (1984). In effect, however, the NLRA has "largely displaced" regulation of industrial relations by the states. *Wis. Dept. of Indus. Labor & Human Relations v. Gould,* 475 US 282, 286 (1986). From this principle emerged the general rule of preemption set forth in *San Diego Bldg. Trades Council v. Garmon*[23], 359 US 236 (1959).

In *Garmon,* the Supreme Court held that "when an activity is arguably[24] subject to *§ 7* or *§ 8* of the [NLRA], the States as well as the federal courts must defer to the exclusive

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[23] In *Garmon,* the NLRB declined to exercise jurisdiction over a case where a labor union picketed before being certified as the bargaining agent for the employees. The California Superior Court exercised jurisdiction and eventually the state court awarded damages to the employer based on state tort and labor relations law. On appeal, the United States Supreme Court reversed the damages award and issued what is now known as the "*Garmon* preemption doctrine". Namely, when conduct is "arguably subject to *§ 7* or *§ 8* of the Act," federal law preempts state regulation on the subject. Because the conduct at issue in the case (strike action) was arguably covered by *§ 7* of the Act, the Supreme Court reversed the state damages award.

Clearly, the conduct that was being regulated in *Garmon*–picketing in support of a labor organization–is radically different from the conduct at issue in the instant case. Here, the focus must be upon what the Defendants did as *individual employers*, not as a labor organization. Defendants terminated Plaintiffs because they reported suspected illegal activity to the law enforcement, not because they supported or objected to the union.

[24] The party claiming preemption is required to demonstrate that the party's case is one that the NLRB could legally decide in the employees favor. See Ann K. Wooster, *Annotation, Construction and Application of the Garmon Preemption Doctrine by Federal Courts,* 2003 ALR Fed 1 § 6 (2003); See also, *Williams v. Watkins Motor Lines, Inc,* 310 F3d 1070, 1072 (8th Cir 2002) and *Int'l Longshoremen's Ass'n v. Davis*, 476 US 380, 396 (1986)

competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245. *Garmon*, however, carved out exceptions to preemption which provide that a state regulation or cause of action will not be preempted if the behavior to be regulated is behavior that is only of peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. *Id.* at 243-244; *Sears, Roebuck & Co v. San Diego County Dist. Council of Carpenters,* 436 US 180, 188 (1978). Accordingly, *Garmon* preemption is not absolute or rigidly applied in "mechanical fashion"[25]. *Farmer v. United Bhd. Of Carpenters & Joiners,* 430 US 290, 296-297, 302 (1977); *Chaulk Services, Inc v. Massachusetts Comm'n Against Discrimination,* 70 F3d 1361, 1371 (1st Cir 1995).

In *Sears, Roebuck & Co v. San Diego County Dist Council of Carpenters,* 436 US at 188-189, 197, 202 (1978), the Supreme Court stated the following with regard to the issue of NLRA preemption of a state cause for trespass which involved picketing workers:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid. (fn. omitted.)
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> ***
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> The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board.

(explaining that the party asserting preemption bears the burden of showing the challenged activity is arguably prohibited by the NLRA.)

[25] The Supreme Court has squarely held that *Garmon* preemption does not turn on whether a claim arises in the context of a labor dispute. *Linn v. United Plant Guard Workers of America, Local 114,* 383 US 53, 63 (1966). ("Nor should the fact that defamation arises out of a labor dispute give the Board exclusive jurisdiction to remedy its consequences.")

Id. at 197. Consequently, there is no preemption unless the controversy before the state court is *identical* to the dispute that could have been presented to the NLRB. *Id.* Because the state court's adjudication of the state claim created "no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practice," there was no *Garmon* preemption. *Id.* at 198. Plaintiffs' retaliatory discharge for their reports of suspected illegal activity to the DOL was not, and could not have been, presented to the NLRB.

B. The NLRA Does Not Preempt Plaintiffs' WPA Claims Because the TULC Volunteers Are Not "Employees" Covered by the Act.

Preemption turns on the nature of the conduct in question, not on the way it is pleaded. *Zavadil v. Alcoa Extrusions, Inc,* 437 FSupp 1068 (DC SD 2006), citing *Platt v. Jack Cooper Transport, Co, Inc,* 959 F2d 91, 94 (8th Cir 1992). The DOL Investigative Report, the November 5, 2009 Legghio letter, and trial court pleadings all establish that Plaintiffs' claimed they were fired because they reported Aaron's suspected criminal activity to law enforcement. The fact that the TULC volunteers lacked proper clothing, safety equipment or failed to receive proper wages was not what prompted Plaintiffs to contact the DOL. Only after Plaintiffs discovered that Aaron had instructed a reluctant Ruedisueli to issue checks from the Union's treasury to the TULC volunteers and falsely attributed payment to a phantom "picket line" duty did Plaintiffs conclude that Aaron was receiving cash kickbacks for providing essentially free labor to the TULC[26]. This alleged kickback scheme is what was reported to--and investigated by--the DOL

[26] The DOL Investigation Report confirms that members who volunteered for the TULC project initially believed that they were contacted for training and not physical labor. This explains why the workers were not properly dressed for demolition work. (294a-295a.) As previously noted, the "training" initially expected by the unemployed union members who volunteered at the TULC, is not mentioned in the Legghio "investigation" letter. (440a-441a.)

Finding the actual facts inconvenient, Defendants scrub virtually all allegations of Plaintiffs' reports of "corruption" or "kickbacks" from their Brief. In spite of this transparent tactic, Defendants cannot sustain their burden of showing that the challenged activity is arguably protected or prohibited by the NLRA. *Int'l Longshoremen's Ass'n v. Davis,* 476 US 380, 396 (1986.); *Northwestern Ohio Adm'rs, Inc v. Walcher & Fox, Inc,* 270 F3d 1018, 1027 (6th Cir 2001).

Defendants correctly note that "activity is 'concerted' if it relates to group action for the mutual aid and protection of *other employees*." (Italics added.) (Defendants Brief on Appeal, pp. 21-22.) Defendants argue that Plaintiffs engaged in "concerted activity" for purposes of *§ 7* of the Act when they told the DOL about "...their fellow members' working conditions and wages. Plaintiffs complaints allege that they acted in concert for the purpose of furthering such group wage and working condition goals[27]." (Defendants Brief on Appeal, p. 24.) Even if this Court were to adopt Defendants' mischaracterization of the true nature of this action, Defendants argument fails because it rests on the erroneous premise that "volunteers" are "employees" under the NLRA[28]. They are not.

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[27] The *First Amended Complaint* alleges that Plaintiffs were fired in retaliation for reporting suspicions of "fraud and illegal activity" to law enforcement. (27a-29a.) The *First Amended Complaint* makes no reference to "concerted activity", "mutual aid and protection", or any other such language and this had nothing to do with their discharge.

[28] In *Int'l Longshoremen Ass'n v. Davis,* 476 US at 394-395, the Supreme Court spoke to a union's burden in arguing preemption: "If the word 'arguably' is to mean anything, it must mean that the party claiming preemption is required to demonstrate that his case is one the Board could legally decide in his favor."

The Supreme Court in *NLRB v. Town & Country Electric, Inc,* 516 US 85, 89 (1995), held that the rights guaranteed in *§ 7* and *§ 8* of the Act only apply to "employees," not volunteers. Section § 152(3) of the Act states, in pertinent part:

> *"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise*, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3) (italics added).

"This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." Eastex v. NLRB, 437 US 556, 564 (1978) (Italics added). Accordingly, *§§7* and *8(a)* are relevant only if an employee is engaged in concerted activity for the benefit of another employee or an employee of another employer. *Id.* As Defendants admit, that is not the case here.

In *WBAI Pacifica Foundation and United Electrical Radio and Machine Workers,* 328 NLRB No. 179 (1999), the NLRB looked to *Town & Country* to hold that unpaid staff who volunteered their time to a non-profit radio station were not "employees" for purposes of the NLRA even though staff members received reimbursements for expenses. Defendants' argument that Plaintiffs engaged in "concerted activity" for the TULC volunteers fails because the volunteers are not "employees" as defined by §152(3) required for protection under *§ 7* and for Defendants conduct to constitute an unfair labor practice for presentation to the NLRB.

Here, Defendants admit that union members who worked on the TULC were unemployed volunteers who gratuitously donated their time. As for the "modest stipend", Defendants' attorney wrote:

> *Stated another away, the modest stipend paid to these Local 1191 members who volunteered their time and work is nothing more than [sic] the Local's effort to modestly reimburse unemployed Local 1191 members for their expenses when they voluntarily donated their work to this cause.* (441a.)

The unemployed union volunteers who worked on the TULC were not covered by the NLRA. Under *Eastex,* and the express language of *§ 7*, therefore, Plaintiffs had no cognizable claim to present to the NLRB, let alone one identical to their WPA claim. The TULC volunteers were induced to show up by false representations (i.e., members believed they were to receive "training") which caused them to perform private work and then their silence was purchased by a monetary payment all in an effort to cover up potential illegal activity. Further effort to conceal this reality included the false entries on the eight checks issued to these volunteers.

C. The NLRA Does Not Preempt Plaintiffs' WPA Claims Because the Act Does Not Prohibit an Employer From Retaliating Against an Employee Who Reports Suspected Illegal Activity to the Department of Labor.

Sears Roebuck emphasized that the "critical inquiry" for determining NLRA preemption "...is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented ...is identical to...or different from...that which could have been, but was not, presented to the Labor Board." 436 US at 197. The NLRA provides no protection for an employee who reports suspected illegal activity to the

DOL. The NLRA only protects an employee who files a charge with the NLRB, testifies before the NLRB or assists in an NLRB investigation. 29 USC § 8 (a) (4) [29].

The unpublished federal district court case of *Flores v Midwest Waterblasting,* 1994 US Dist LEXIS 17704 (DC MI 1994), discussed at length by Defendants, is instructive. In *Flores,* plaintiff employees learned that the employer was not abiding by the terms of the collective bargaining agreement with respect to wages. Plaintiffs alleged that after they complained to the defendant employer about its failure to pay contractual wages, the employer retaliated by reducing their hours of work, threatening to fire them, and otherwise harassing them. The plaintiff employees subsequently filed reports with the NLRB. They filed suit against the employer, alleging, among other things, that the defendant employer violated the Michigan WPA by discriminating against them for making reports to the NLRB and other undisclosed public authorities.

The *Flores* court held the plaintiffs' WPA claim was preempted under *Garmon* because *§ 8(a) (4)* of the NLRA *specifically* protects employees who file charges or give testimony to the NLRB. The court, *supra* at *25-*26, wrote:

> Plaintiffs' Whistleblower's claim is preempted under *Garmon.* § 8(a) (4) of the [NLRA] provides that "[i]t shall be an unfair labor practice for an employee to discharge or

[29]The NLRA has no analogue to the WPA and does not prohibit an employer from discharging an employee because he or she reported suspected criminal activity to law enforcement, including the DOL. *§ 8(a) (4)* of the NLRA only provides that "it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" under the Act. 29 USC § 158(a) (4). Consequently, an employer may not discriminate against an employee for giving sworn statements to an NLRB field examiner, even though the employee had neither "filed charges" nor "given testimony" at a hearing, *NLRB v. Scrivener,* 405 US 117(1972), or for filing a claim with a state labor commission that his employer failed to pay him according to a collective bargaining agreement. *NLRB v. Searle Auto Glass, Inc.,* 762 F2d 769, 774 n. 6 (9th Cir 1985). In this case, no one filed a charge of any kind with the NLRB, testified at any hearing or interviewed with an NLRB agent. In addition, no collective bargaining agreement is at issue in spite of Defendants' misleading efforts to insinuate that one is.

> otherwise discriminate against an employee because he has filed charges or given testimony under the Act. 29 USC § 158(a) (4).
>
> ****
>
> Here, Plaintiffs claim they were discriminated against because they made reports about Defendant employers' "misconduct" to the NLRB and other undisclosed public authorities. Such reports are protected activity under § 7 of the NLRA and an employer commit an unfair labor practice if it discriminates against the exercise of such protected activity. 29 USC § 158(a) (4). Therefore, the discrimination claimed of in Plaintiffs' Whistleblowers' claim is preempted under *Garmon.*

The court in *Flores* distinguished between making reports to the NLRB–conduct expressly protected under the NLRA–and making reports to outside agencies. So as to negate any remaining doubt about why they were preempting the WPA claims, the court added:

> **§ 8(a) (4) does not apply to filing charges or testifying under legislation other than the NLRA.** See *B & M Excavating,* 155 NLRB 1152 (1965), *enf'd* 368 F2d 624 (9th Cir 1966). **To the extent that Defendants discriminated against Plaintiffs for making reports to public bodies other than the NLRB concerning issues unrelated to the CBA and not arguably prohibited or protected by the NLRA, Plaintiffs Whistleblowers' claim would not be preempted.** Plaintiffs, however, did not specify any public bodies other than the NLRB. (Complaint, para. 74-76.) Therefore, Plaintiffs allegations fail to state a claim other than the NLRB claim discussed above.

Flores, supra at n. 4. (Bold added.) Under the analysis in *Flores,* the NLRA does not preempt Plaintiffs WPA claim because there was no cognizable issue which was, or could have been, presented to the NLRB. Plaintiffs reported suspected criminal activity to the Department of Labor.

Defendants further misplace reliance on *Calabrese v. Tendercare of Michigan of Michigan,* 262 Mich App 256 (2004), *Sitek v. Forest City Enterprises, Inc,* 587 FSupp 1381 (DC MI 1984) and other unpublished opinions. All of these cases involved plaintiffs who were retaliated against because they refused to discriminate against union employees or engage in

union busting activity specifically prohibited by the NLRA[30]. *Calabrese* involved an employee who was fired because she refused to fire co-employees for engaging in unionizing activities and filed a complaint in state court for wrongful discharge in violation of public policy, tortious interference with business relations and intentional infliction of emotional distress. 262 Mich at 257-259. Citing the "critical inquiry" language in *Sears Roebuck,* the *Calabrese* court found plaintiffs state claim was preempted by the NLRA because firing an employee for refusing to interfere with unionizing activity was an unfair labor practice pursuant to *§ 8 (a) (1)* and *(3)* and was an issue identical to that which could have presented to the NLRB. *Id.* at 261-262. In *Sitek,* the District Court found NLRA preemption because *§ 7(a)* specifically prohibited an employer from discharging an employee for refusing to engage in union busting and the issue was one identical to that which could have been filed with the NLRB on an unfair labor practice charge. 587 FSupp at 1384.

Calebrese, Sitek and other opinions cited by Defendants are easily distinguishable and support state court jurisdiction. Plaintiffs' terminations have nothing do with union busting, discriminating against union members, and the right of employees to organize or any other unfair labor practice. See, *Suarez v. Gallo Wine Distributors, Inc,* 32 AD3d 737 (NY App 2006). *§ 8(a) (4)* of the NLRA only provides protection for employees who testify before the NLRB or cooperate in an NLRB investigation—not to the DOL. Plaintiffs' WPA claim is not an issue

[30] All of the unpublished cases cited by Defendants are inapposite. These unpublished decisions involved plaintiffs who had either refused to discriminate against union members, engaged in unionizing activity, testified before the NLRB or engaged in other activity expressly protected under *§ 8(a) (1), (3)* and *(4).* In those cases, preemption was appropriate. In this case it is not. Nothing in the NLRA prohibited Defendants from retaliating against Plaintiffs (or protected Plaintiffs from retaliation) for their reports of suspected criminal activity to the DOL.

"identical" to one that could have been filed with the NLRB. State court jurisdiction over Plaintiffs' WPA will not interfere with or frustrate *any* federal labor laws.

D. Neither Plaintiffs Nor Defendants Ever Sought Relief From the NLRB.

Whether a party first sought relief through the NLRB is "highly relevant" in determining whether the NLRA preempts a state claim. *Platt v. Cooper,* 959 F2d 91, 95 (8th Cir 1992); *Sears Roebuck, supra* at 202, 231-232. "The risk of interference with the Board's jurisdiction is ...obvious and substantial" when an unsuccessful charge to the Board is recast as a state law claim. *Local 926, IUOE v. Jones,* 460 US 669, 683 (1983). As the Eleventh Circuit said in *Parker v. Connors Steel Co,* 855 F2d 1510, 1517 (11th Cir 1988, cert. denied, 490 US 1066 (1989):

> We believe that the [*Garmon* preemption] rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state claims and pursued in state court.

Also see, *Local Union No. 12004, United Steel Workers of America v. Commonwealth of Massachusetts,* 377 F3d 64, 80 (1st Cir 2004) ("Under *Sears Roebuck,* there is a strong argument that the rationale for *Garmon* preemption is less powerful when a party voluntarily chooses to forego the primary jurisdiction of the NLRB.")

This point is highlighted by the very cases cited by Defendants. *Platt* involved a truck driver whose union filed a grievance under the collective bargaining agreement objecting to his firing. *Id.* at 92-93. The plaintiff then filed a charge with the NLRB (a fact omitted by Defendants in their recitation) which alleged he was fired "because of his union and concerted activities." *Id.* at 93. When the NLRB declined to issue a complaint, the plaintiff filed an action

in state court that he was fired for safety complaints rather than for "union and protected concerted activities." *Id.* at 94.

The Eight Circuit found that the NLRA preempted the plaintiff's claims because: (1) the collective bargaining agreement protected his right to make safety complaints and (2) the challenged conduct occurred in the context of a labor dispute and he could have filed an unfair labor practice with the NLRB based on the collective bargaining agreement and (3) "it is highly relevant that Platt unsuccessfully sought relief through the grievance process, and the NLRB before commencing suit." *Id.* at 95. Significantly, the *Platt* court, *id.*, wrote:

> **We do not reach the question whether employee suits seeking redress for violation of state whistle-blower statutes are generally preempted under *Garmon* because we believe the "local interest" exception to *Garmon* requires a more fact sensitive approach. (Bold added)**

Rodriguez v. Yellow Cab Cooperative, Inc., 206 Cal App 3d 668 (Cal App 1998), another case cited by Defendants, further illustrates this point. In *Rodriguez*, the plaintiff, a union organizer, was fired after he filed a class action lawsuit on behalf of the union and testified on behalf of the union before the California Public Utilities Commission (PUC). *Id.* at 662, 674. After his firing, the plaintiff filed an unfair labor practice charge with the NLRB claiming that he was discharged in retaliation for his union activities. *Id.* at 672. After the NLRB investigated and dismissed the charge, plaintiff filed a claim in state court in which he alleged that he was fired because of his testimony before the PUC and because he filed the class action suit against his employer.

In holding that the plaintiff's recast state claim was preempted under *Garmon* and *Sears,* the *Rodriguez* court reasoned:

> It is clear that a state court would look at the same aspects of appellant's situation as the Board. The NLRB refused to take action on appellant's charge because it found respondent had "disciplined many other employees engaging in similar conduct" and that appellant was not treated differently from other employees with a similar work record. This would also be the central issue at a trial in state court. That is, appellant could not hope to prevail at such a trial without disproving the factual finding before the NLRB[31].

Id. at 678-679. Accordingly, preemption was appropriate because there was "a 'realistic threat' that a state judicial proceeding would impinge on 'the federal regulatory scheme.'" *Id.* at 679, citing *Farmer, supra,* at 305.That "threat," however, is not a possibility in Plaintiffs' WPA case.

Similarly, in *MVM v. Rodriguez,* 568 FSupp 2d 158 (DC PR 2008), a District Court found that a plaintiff's whistleblower claim was preempted because he submitted the same claim to the NLRB. *Id.* at 178. The *MVM* court found that permitting the state whistleblower action to go forward presented a "substantial threat of interference with the regulatory scheme because "...there is a claim still pending before the NLRB and deciding this controversy entails an obvious risk of creating inconsistent judgments in distinct fora." *Id.* at 179.

The danger of NLRB interference addressed in *Platt, Rodriguez* and *MVM* simply does not exist in the case *sub judice*. No party filed a charge with the NLRB on any matter, nor could they. This case does not involve a collective bargaining agreement, union busting, discrimination against union members, or other matters expressly protected or prohibited by the NLRA. Plaintiffs' claims do not "purport to regulate any conduct subject to regulation by the NLRB" and the NLRB's position as the authoritative interpreter of the NLRA is not threatened. *Fort Halifax Co v. Coyne,* 482 US 1, 22 (1987). A state court proceeding on Plaintiffs' WPA claim

[31] Contrary to Defendants assertion, and as stated in the quoted passage, the *Rodriguez* plaintiff *did* file charges with the NLRB on the very issue presented in his state court action. (Brief on Appeal, p. 28.)

will not conflict with any determination of the NLRB or interfere with the federal regulatory scheme. Plaintiffs' WPA claims are peripheral to the NLRA. Accordingly, Plaintiffs' WPA claims are not subject to preemption.

E. Plaintiffs' WPA Claims are of Peripheral Concern to the Purposes of the NLRA or Touch Upon Matters Deeply Rooted in Local Feeling and Responsibility.

State regulation of activity will not be preempted under *Garmon* if the activity is "a merely peripheral concern" of the NLRA, or if it "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it cannot be inferred that Congress removed the state power to act." 359 US at 243-245. And state jurisdiction will not be ousted "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by federal labor statutes." *Farmer v. United Bhd of Carpenters and Joiners of Am, Local 25,* 430 US 290, 297 (1977) (citation omitted). When analyzing whether a law is preempted under *Garmon*, courts conduct a "balanced inquiry" into the nature of the interests at stake and the "effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Id.* at 300-301.

1. Plaintiffs' WPA claims for retaliatory discharge because they reported suspicions of union corruption to the DOL is peripheral to the concerns of the NLRA.

In *Roussel v. St. Joseph Hospital,* 257 FSupp 2d 280 (DC ME 2008), the District Court found that the NLRA did not preempt a state whistleblower claim. *Roussel* involved a nurse who

was fired after she complained to Maine Labor Bureau about hours and working conditions. The *Roussel* court found that plaintiff's claims that defendant terminated her employment for exercising her rights under the Maine Whistleblower Protection Act were "merely peripheral to the NLRA." *Id.* at 285, citing *Veal v. Kerr-McGee Coal Corp,* 682 FSupp 957 (SD Ill 1988) (finding that plaintiff's claim for retaliatory discharge resulting from filing a workmen's compensation claim not preempted by the NLRA because the conduct was only of peripheral concern to the Act's purpose).

As acknowledged by Defendants in their lower court pleadings, Plaintiffs' WPA claim stems from their discharge in retaliation for their reports to the DOL of Aaron's suspected kickback scheme. Plaintiffs' state action does not request or require any state court to regulate wages, working conditions or interpret a collective bargaining agreement (there is none). Even if Plaintiffs' WPA claims required factual overlap with issues arguably covered by the NLRA that would not justify preemption: "Although the analysis of a state law claim may involve attention to the same factual considerations as a charge before the National Labor Relations Board, such parallelism does not require *Garmon* preemption." *Zavadil v. Alcoa Extrusions, Inc,* 437 FSupp 2d 1068, 1075 (DC SD 2006) citing *Lingle v. Norge Div of Magic Chef, Inc,* 486 US 399, 408 (1988).

The fact that Plaintiffs incidentally mentioned to the DOL criminal investigators that Aaron required members (later found to be "volunteers") to work in unsafe conditions for non-union wages and repeated this in the complaint, does nothing to interfere with any federal regulatory scheme. Even if this Court accepted Defendants' misleading narrative, the ultimate

issue would remain whether Plaintiffs were engaged in activity expressly protected under the WPA. Because this case involves two employees who worked for a union does not transform this case into one preempted under *Garmon.* Indeed, if the Court were to adopt Defendants argument, labor unions would effectively be exempt and unaccountable in a state court for violating a Michigan citizen's WPA civil rights. Persons engaged in criminal activity would be further insulated. This is not what the WPA or *Garmon* and its spawn contemplate.

Plaintiffs' claims do not "purport to regulate any conduct subject to regulation by the NLRB" and the NLRB's position as the authoritative interpreter of the NLRA is not threatened or otherwise jeopardized. *Fort Halifax Co v. Coyne,* 482 US 1, 22 (1987). Accordingly, Plaintiffs' WPA claims are peripheral to the core purpose of the NLRA to maintain "industrial peace."

2. **The WPA touches on interests deeply rooted in local feeling and responsibility.**

The WPA has been Michigan law for over 30 years. The Michigan Legislature provided Michigan citizens with protection against retaliation when they engaged in protected activity as defined by the statute. The purpose was, as discussed above, to encourage and promote employees to report suspected wrongdoing to public bodies, including law enforcement. Reports to law enforcement are especially important because they implicate criminal conduct. The public benefit derived from whistleblowers is obvious and undeniable because it brings wrongful acts into the light for public bodies to do with what they deem best. It is expansive and applies to all employers, public and private alike. It makes no exceptions for profits or non-profits, including

labor unions. This should hold true where the reports involve suspected criminal activity, as they do here.

Plaintiffs were covered by the WPA, reported suspected illegal activity to law enforcement and were fired because they "blew the whistle." Plaintiffs' reports to the DOL advanced the very interests embodied by the state statute. The policies underlying the WPA stem from deeply rooted interests and touch upon local feeling that employees who disclosure wrongdoing receive protection from retaliation by their employer—virtues which, under *Garmon,* are not subsumed by the NLRA. Accordingly, the NLRA does not preempt Plaintiffs' WPA claims.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for the reasons set forth above, Plaintiff-Appellees respectfully request this Court to vacate the order granting leave as it was improvidently issued or, in the alternative, affirm the Court of Appeals.

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Dated: June 28, 2013.

STATE OF MICHIGAN
SUPREME COURT

Appeal From the Michigan Court of Appeals
The Hon. Amy Ronayne Krause, Henry William Saad and Kurtis T. Wilder

ANTHONY HENRY and KEITH WHITE,

Plaintiffs/Appellees,

vs.

LABORERS LOCAL UNION 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191 and MICHAEL AARON,

Defendants/Appellants,

and

BRUCE RUEDISUELI,

Defendant/Appellee,

Supreme Court No. 145631

Court of Appeals No. 302373

Wayne County Circuit Court
Case No.: 10-000384-CD

AND

MICHAEL RAMSEY and GLENN DOWDY,

Plaintiffs/Appellees,

vs.

LABORERS LOCAL UNION 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191, MICHAEL AARON,

Defendants/Appellants,

And

BRUCE RUEDISUELI,

Defendant/Appellee.

Supreme Court No. 145632

Court of Appeals No: 302710

Wayne County Circuit Court
Case No: 10-004708-CD

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PROOF OF SERVICE

Lisa M. Bezzo states that on June 27, 2013 she served two copies of *Plaintiffs-Appellees Michael Ramsey and Glenn Dowdy's Appeal Brief* and this Proof of Service to:

Christopher P. Legghio
306 S. Washington Avenue, Suite 600
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by placing a copy of said documents in an envelope properly addressed, with first-class postage prepaid thereon, and by depositing the envelope in a United States mail receptacle in Troy, Michigan.

Lisa M. Bezzo